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No. 87-338

In The
Supreme Court of the United States
October Term, 1987

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PETER EVICH; ESTATE OF OGIE BERG,
Petitioners,
v.
TERRY MORRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. CONNELLY, et al.,
Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondents Terry Morris and John J. Connelly, respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 819 F.2d 256.

STATEMENT OF THE CASE

Respondents' decedent, Robert J. Connelly, died on or about March 29, 1980 as a result of a maritime casualty in Alaska territorial waters. He was survived by three non-dependent brothers. Various actions, including this one, were consolidated for trial in the Western District of Washington. Initially, the district court denied recovery against petitioners. On appeal, the Ninth Circuit Court of Appeals reversed, joining other circuits in recognizing a general maritime survival action, and remanded for a determination of damages. *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985).

On remand, the district court awarded respondents recovery for the decedent's pre-death pain and suffering, together with funeral expenses, but denied recovery for loss of future earnings, despite having awarded these damages against another defendant in the earlier action. (That defendant was subsequently dismissed, *Berg v. Chevron*, 759 F.2d 1425 (9th Cir. 1985).) The Ninth Circuit again reversed, holding, *inter alia*, that the decedent's future earnings were properly recoverable in such an action. *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987).

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REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals Fully Considered the Issue and Correctly Decided the Case.

The harsh common law rule that a cause of action for personal injury abated upon the death of the plaintiff or defendant has been universally remedied in this country through the enactment of survival and/or revival statutes. Minzer, *Damages in Tort Actions*, § 20.10, p. 20-31 (1982). The harsher common law rule that the killing of a human being did not constitute a tort has been similarly remedied. *Id.* In *Moragne v. States Marine Lines*, 398 U.S. 375, 395, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970), this Court decided that these antiquated common law concepts would not apply under the general maritime law, noting that

> within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The court below, relying on *Moragne*, noted that allowing future economic loss to be recovered in survival actions ". . . prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him." *Evich v. Morris*, *supra* at 258. Petitioners now ask this Court to allow them to retain this anomalous "reward." The court of appeals properly concluded that such a position was not compatible with the fundamental principles of federal maritime law, nor with the remedial object of wrongful death and survival actions.

a. Recovery for Future Earnings Comports with the Underlying Theory of a Survival Action.

A survival action simply saves the decedent's cause of action for personal injuries. Loss of future earnings commonly is an element of damages in a personal injury action. Upon the death of the plaintiff, logic dictates that this element of his or her claim should survive:

> A permanent loss of earning power is usually the chief economic harm caused by a permanent injury. If [plaintiff] in his lifetime had recovered judgment in his action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require. When he died, his right to these damages passed under the Survival Act to his administratrix, the present appellant, for the Act provides that the injured person's right of action for physical injury "shall survive" . . . .

Hudson v. Lazarus, 217 F.2d 344, 348 (D.C. Cir. 1954); *see also: Criscuola v. Andrews*, 82 Wn.2d 68, 507 P.2d 149 (1973); *Runyon v. District of Columbia*, 463 F.2d 1319 (D.C. Cir. 1972); *Incollingo v. Ewing*, 444 Pa. 263, 444 Pa. 299, 282 A.2d 206 (1971); *Osborne v. Russell*, 669 P.2d 550 (Ak. 1983).

As Minzer, *supra* at 21-33 notes,

> [c]learly, if the victims had survived, recovery could have been had for [future earnings], so that interpreted literally, most survival acts would appear to provide such coverage. At noted, however, the danger of double recovery has caused most jurisdictions to reach a contrary conclusion.

b. Potential Double Recovery Problems Can Be Prevented by More Appropriate Measures.

Petitioners primarily rely upon a procedural rule of convenience that "post-mortem earnings are not recoverable under a majority of state survival statutes . . . . " This rule, however, is fashioned solely to prevent a double recovery of the decedent's future earnings in both a survival action and a collateral wrongful death action.[1] Respondents submit that the possibility of a double recovery (which does not exist in this case) does not afford a principled basis for categorically denying recovery of future economic loss that was clearly occasioned by a defendant's tortious conduct. A federal court is fully able to deal equitably with such issues on a case-by-case basis. As this Court noted in a like vein when rejecting a similar argument in *Sea-Land Services v. Gaudet*, 414 U.S. 573, 592, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974),

> [a]ny potential for such double liability can be eliminated by the application of familiar principles of collateral estoppel to preclude a decedent's dependents from attempting to relitigate the issue of the support due from the decedent's future wages.

Many states have also dealt with this potential problem in a more considered fashion:

> The jurisdictions which permit recovery for loss of future earnings in the survival action have negated

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1. "The majority of jurisdictions allow the plaintiff in a survival action to recover damages for the decedent's lost earnings, but limit the recovery to earnings between the time of injury and the time of death. Probable earnings after death are not recoverable because of the danger of double recovery, as the decedent's future earnings are often considered in a related wrongful death action." Minzer, *supra*, § 21.20, pp. 21-29.

> the double recovery problem by tailoring the measure of damages to reflect the amounts recoverable under the wrongful death statute.

Minzer, *supra*, § 21.22, p. 21-34. *See, e.g., Criscuola v. Andrews, supra; Runyon v. District of Columbia, supra.* These jurisdictions have not had any difficulty in dealing with the so-called "conflict of prioritization" problem referenced by petitioners. This is not surprising for, indeed, petitioners do not submit any convincing argument that any such "dilemma" will result.

Petitioners' reference to alleged problems of uniformity in maritime law is also void of any substantive content. No other federal appellate court since *Moragne* has ruled that future ecnomic loss is *not* recoverable in a maritime survival action; hence, uniformity is not in issue. Should another circuit, in the future, reach a contrary conclusion, the goal of uniformity in maritime law might conceivably present a basis for review. However, at this juncture, without any apparent conflict or controversy, the issue is not sufficiently "ripe" to justify consideration by this Court.

Petitioners' assertion that respondents seek a "windfall" is a paradox in view of the pertinent authorities, which have consistently noted that it is the *tortfeasor* who reaps the "windfall" when recovery of future economic loss is categorically denied:

> Some courts and commentators have recognized that the refusal of the courts to allow for the recovery in a survival action of any of the decedent's lost future earnings may prevent a double recovery, but may also result in a windfall to the wrongdoer. Thus, it has been pointed out that even if a decedent's prospective future earnings are reduced by his personal mainte-

> nance costs and by the portion of such earnings which he would contribute to those persons entitled to recover under the wrongful death statute, there may still be some earnings left over. These excess earnings, it has been argued, should be recoverable in a survival action maintained for the benefit of the decedent's estate. Accordingly, numerous courts, although not specifically referring to this argument, have held that, even where an action is maintainable under the wrongful death action, a decedent's lost future earnings can be recovered in a survival action.

76 A.L.R.3d 125, 131.[2]

c. Where No Wrongful Death Action Exists, Any Concerns Regarding Double Recovery Cease to Exist.

The author of the Annotation appearing at 76 A.L.R.3d 125, 130[3] notes that

> [w]here an action is not maintainable under the wrongful death statute, the danger of a double recovery is removed and, accordingly, in this situation, the courts have allowed the decedent's personal representative to recover in a survival action for the decedent's lost future earnings.

See, e.g., Kyes v. Valley Tel. Co., 132 Mich. 281, 93 N.W. 623 (1903); *Kriesak v. Crowe*, 36 F. Supp. 127 (M.D. Pa. 1940).

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2. Annotation: Recovery, in Action for Benefit of Decedent's Estate in Jurisdiction Which Has Both Wrongful Death and Survival Statutes, of Value of Earnings Decedent Would Have Made After Death, 1977.

3. See fn. 2.

2. The Issue Presented By the Petition Does Not Warrant Review at This Time.

Petitioners suggest that this case is in conflict with *In re Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 430 U.S. 975 (1975). *In re Cambria*, however, is a wrongful death action. While the Sixth Circuit considered similar issues it did not do so in the context of a *survival* action. Consequently, that decision has questionable relevance to the issue of what elements of damages are recoverable in a maritime survival action. *In re Cambria* certainly has not created a conflict among the circuits.

The Third Circuit, in *Mascuilli v. United States*, 411 F.2d 867 (3d Cir. 1969), decided prior to *Moragne*, allowed recovery of future earnings in an action "saved" by the Pennsylvania Survival Act. The court there noted that the elements of damages were governed by federal maritime law and apparently regarded plaintiff's right to recover lost future earnings as being so basic as not even to call for comment.

In *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361 (W.D. Wash. 1974), the district court, relying upon *Moragne*, specifically allowed recovery of future economic loss in a maritime survival action.

In short, this is the only post-*Moragne* federal appellate case to have addressed this specific issue. Respondents submit it does not have the potential national import to warrant review until there is further "sifting" as contemplated by *Moragne*. Accordingly, issuance of the writ at this time would be premature.

3. The Petition for Writ of Certiorari Presents Only One Question; Not Two As Stated by Petitioners.

Concisely stated, respondents understand the petition for certiorari to state two questions:

(1) Does a survival action exist under general maritime law? and

(2) Is post-mortem economic loss an element of damages in such an action?

As to the first question, respondents submit that the circuit courts uniformly recognize a maritime survival action[4] and, accordingly, review on writ of certiorari on this basis is not warranted. Supreme Court Rule 17.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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4. *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 446 F.2d 903 (8th Cir. 1972); *Greene v. Vantage S.S. Co.*, 466 F.2d 159 (4th Cir. 1972); *Ward v. Union Barge Line Corp.*, 443 F.2d 565 (3d Cir. 1971).